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U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

2003 DEC 16 P 4:23

IN THE MATTER OF
DHL AIRWAYS, INC.

DOCKET NO. OST-2002-13089-593
(Citizenship Proceeding)

ASTAR AIR CARGO, INC.'S OPPOSITION TO FEDEX'S SECOND MOTION FOR LEAVE TO FILE AN IMPROPER SUR-REPLY

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Dated: December 16, 2003

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" . . . and the beat goes on." ASTAR Air Cargo, Inc. ("ASTAR") is compelled to file this motion for leave to file and opposition, pursuant to 14 C.F.R. 302.11, in response to the attempt by Federal Express and United Parcel Service (collectively "FedEx") to file a Second Improper Sur-Reply on December 15, 2003.

There are at least two things in this docket that cannot be seriously disputed. One is that the ALJ and the Department would apply the "actual control" test in deciding whether ASTAR is a U.S. citizen.[1] The second is that FedEx does not know when to quit filing papers. In its latest filing FedEx purports to notify the ALJ that he "must" rely on the Department's precedent applying the "actual control" standard because that standard was codified in the recent Vision 100-Century of Aviation Reauthorization Act, H.R. 2115, 108th Cong. (2003) ("FAA Reauthorization Act"), which was signed into law on December 12, 2003. Second Sur-Reply at 1-3. Had FedEx stopped there – advising the ALJ that the actual control standard is now part of the statutory definition and not simply a creature of Department precedent – its filing would have been unnecessary, but, at least not unnecessary and improper.

However, not knowing when to leave well enough alone, FedEx's Second Sur-Reply goes on to re-argue that the ALJ cannot consider competition and public policy considerations in this proceeding, attempting to revive the same arguments FedEx made in closing arguments and its Post-Hearing Brief. See, e.g., FedEx's Post-Hearing Brief at 83-84; Oct. 15 Hrg. Tr. at 2906:16-2907:18. Thus, FedEx claims that because the definition of a U.S. citizen appears in "Subpart I" of Part A of Title 49, 49 U.S.C. §

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[1] And while ASTAR objected to the Department's engrafting of the actual control test, and sought to preserve that argument for appeal, see ASTAR's Post-Hearing Brief at n.5, there could be no question that the "actual control" test would be applied to this proceeding.

40101 (at § 40102(a)(15)), the Department's mandate to "place[] maximum reliance on competitive market forces and on actual and potential competition" and consider factors such as "preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation[,]" id. at § 40101 (a) (6), (9), (10), does not apply to the certificate requirements of "Subpart II" (49 U.S.C. § 41101). See Second Sur-Reply at 4-6. See also FedEx's Post-Hearing Brief at 83-84 (same); Oct. 15 Hrg. Tr. at 2906:16-2907:18 (same). This argument was frivolous when made the first two times and it is no less frivolous now. As ASTAR has previously stated, the Department's statutory mandate applies to the issuance of certificates of public convenience and necessity under Subpart II (which require U.S. citizenship), regardless of whether the definition of a U.S. citizen appears in Subpart I. See ASTAR's Post-Hearing Brief at 9-12. And Department precedent has fully recognized that mandate in the citizenship context. See id.[2] None of that was changed by the codification of "actual control" into the definition of U.S. citizen.

In short, the only thing that changed with the FAA Reauthorization Act is that ASTAR can no longer argue in any review of this proceeding that the Department improperly engrafted the actual control test into the citizenship statute. Since that was obvious, no further filing was necessary. But, if FedEx could not restrain itself, it could

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[2] As FedEx states, the ALJ "must rely on established case law in determining whether ASTAR is under the actual control of U.S. citizens in determining its citizenship." Second Sur-Reply at 3. That body of case law expressly acknowledges that competition and public policy are appropriate considerations in determining citizenship. See In re USAir and British Airways, Docket Nos. 49491, 48640, Order 93-3-17, 1993 WL 75439, at *11-13 (Mar. 17, 1993) (considering competitive impact arguments in petitions questioning citizenship of USAir after foreign investment); In re Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc., Docket No. 46371, Order 91-1-41, 1991 WL 247884 (Jan. 23, 1991) at *5 ("Northwest I") (recognizing in assessing citizenship "the complexities of today's corporate and financial environment" and "the context of the liberalized aviation relationship that prevails between the United States and KLM's homeland").

have informed the ALJ of this in one sentence. Instead it chose to re-brief its competition arguments. For this reason, FedEx's improper Second Sur-Reply, as well as its baseless arguments to exclude competition and public policy considerations from this proceeding, should be rejected.

Conclusion

FedEx should stop filing frivolous and improper pleadings and let the ALJ write his recommended decision. As the late Judge Gurfein once wrote, "'enough is enough.'" Broder v. Pfizer, Inc., 72 Civ. 2571/4315, 1972 WL 648, at *8 (S.D.N.Y. Nov. 28, 1972).

Respectfully submitted,

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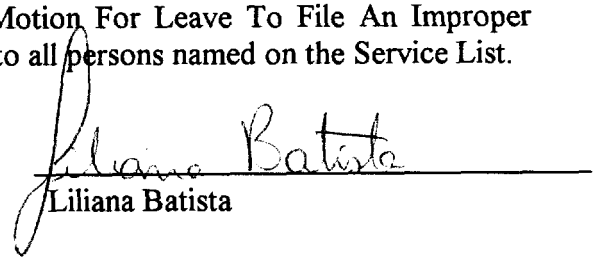
CERTIFICATE OF SERVICE

I hereby certify that I have served, as indicated, copies of the foregoing ASTAR's Opposition To FedEx's Second Motion For Leave To File An Improper Sur-Reply, this 16th day of December, 2003 to all persons named on the Service List.



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